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MATRIMONIAL RELIEFS UNDER THE HINDU MARRIAGE ACT AND THEIR OPERATION

By

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Marriage is the very foundation of civil society and no part of the laws and institutions of a country can be of more vital importance to its citizens than those which regulate the manner and conditions of forming, and, where necessary of dissolving the tie. The remedies provided by law in relation to conjugal rights and duties are compendiously referred to as matrimonial reliefs. The nature and scope of the reliefs available necessarily depend on the concept of marriage in a particular civilisation or community, whether it is essentially a matter of religion or a matter of agreement. Four types of matrimonial reliefs are well-known. These are by way of (*i*) restitution of conjugal rights, (*ii*) judicial separation, (*iii*) declaration of nullity of marriage, and (*iv*) dissolution of marriage. Among the Hindus, till recently, marriage was closely associated with religion and was regarded as a samskara or sacrament. Yet for a fairly long period of time, in fact ever since the British took over the administration of justice, relief by way of restitution of conjugal rights has been available from the Courts. Judicial separation as such was an unfamiliar relief, though in effect it resulted when one of the spouses had successfully resisted an action for restitution of conjugal rights. Declarations of nullity of marriages were also not unknown[1]. Divorce in the case of Hindu marriages, at the instance of a spouse, was not ordinarily available through Courts, though customary divorces were recognised, and it was also possible for a Hindu marriage being dissolved at the instance of one of the parties to the marriage becoming a convert to Christianity and thereafter initiating proceedings under the Native Converts Marriage Dissolution Act[2]. The Hindu Marriage Act of 1955 has provided for the grant of all the four aforementioned matrimonial reliefs in respect of a Hindu marriage whether solemnised before or after the passing of the Act. Section 9 provides for restitution of conjugal rights; section 10 for judicial separation; sections 11 and 12 for declaration of nullity of marriage, and section 13 for dissolution of marriage. In regard to the administration of these reliefs certain important directives have

1. *Rakeya Bibi* v. *Anil Kumar*, I.L.R. (1948) 2 Cal. 119; *Ratan Moni Debia* v. *Nagendra Narain Singh*, I.L.R. (1945) 1 Cal. 407.

2. Act XXI of 1866.

been laid down in the Act, which, in actual working have brought to light a number of important points.

Under section 11, a marriage may be declared to be null and void on a petition which may be presented by either of the parties to the marriage for any of the reasons specified therein. This provision has brought up the question whether it will be competent to a person other than a party to the marriage to file a petition for a declaration of nullity of the marriage. In *Lakshmi Ammal* v. *Ramaswami Naicker*[1], a person had, after the coming into force of the Hindu Marriage Act, married a second time during the subsistence of an earlier valid marriage. It was contended that inasmuch as the policy of the Act is to prevent polygamy and there is specific provision that in such cases the second marriage is void and illegal, valuable rights thereby accrue in favour of the first wife which should be capable of vindication in law inasmuch as for every right there should be a corresponding remedy as pointed out by Holt, C.J., in an *Anonymous* case[2] and that the first wife should be given the right to apply under section 11 as otherwise she may be left remediless. The contention was rejected. It was held that the summary remedy of an application under section 11 is available only to the very parties to the impugned marriage and to none else, and cannot be extended to a co-wife, co-husband, concubine, paramour, etc., on the ground that they also perform the same functions as the husband and wife, the parties to the second marriage. It was also held that though the first wife will have no *locus staudi* for claiming the cheap and summary remedy available under section 11, she can file a suit under the ordinary law to have the second marriage declared void and illegal, that such a remedy is always open to her, and hence it will not be correct to state that she would be left without a remedy in case she is not allowed to apply under section 11.

To prevent hasty divorces, section 14 lays down that it shall not be competent for any Court to entertain a petition for dissolution of marriage by a decree of divorce within less than three years of the marriage, provided, however, that the Court may grant leave for presentation of a petition for divorce within the period in cases of exceptional hardship to the petitioner or of exceptional depravity of the respondent. It is further provided by section 23(2) that before proceeding to grant any relief under the Act it shall be the duty of the Court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties. This consideration is also to be kept in mind in dealing with an application for leave to present a petition for dissolution of the marriage within the three year limit, along with the interests of the children of the marriage. The provision in section 14 of the Hindu Marriage Act corresponds to section 2 (1) of the English Matrimonial Causes Act, 1950. Two questions of considerable interest have emerged in England on the language of the section, namely, firstly; what exactly the words ' exceptional hardship to the petitioner ' signify ; and, secondly, whether the question is to be decided objectively or subjectively. The decision in *Bowman* v. *Bowman*[3], seems to favour an objective appraisal, and according to Denning, L.J., the words ' exceptional hardship to the petitioner ' would cover cases like

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1. (1959) 1 M.L.J. 333.
2. 6 Mod. 27 : 87 E.R. 791.
3. (1949) P. 358 : (1949) 2 All E.R. 127.

(*a*) adultery plus desertion by the husband in favour of another woman, (*b*) adultery plus cruelty of the wife, (*c*) adultery resulting in the birth of a child to the wife, (*d*) promiscuous and indiscriminate adultery, and (*e*) cruelty accompanied by drunkenness or coupled with perverted lust. A later decision of the Court of Appeal in *Hillier* v. *Hillier and Latham*[1] indicates a somewhat different approach and outlook. In that case, the parties had married on March 24, 1956. In November of that very year the wife left the husband and was vacillating in her intention to return to him. This occasioned distress to the husband leading to a break-down in his health. In the course of the year 1957, the wife met the co-respondent and committed adultery with him resulting in pregnancy. According to a medical certificate filed in the case the birth of her child was expected to take place round about May 5, 1958. The wife stated that she loved the co-respondent, continued to live with him, and wanted to marry him, and there was no probability of her returning to her husband. In those circumstances, the husband presented an application for leave to petition for divorce within three years of the marriage on the ground of exceptional hardship to him. Wrangham, J., refused his request as according to him adultery plus pregnancy did not constitute 'exceptional hardship' since the conception of a child is a reasonably normal result of adultery and is not so far removed from the ordinary that it *ipso facto* converted the hardship of having an adulterous wife into a case of exceptional hardship. In reaching the conclusion the learned Judge had viewed the matter wholly objectively. An appeal from his decision was preferred to the Court of Appeal, and fresh evidence was admitted in that Court showing that the husband's suffering was such that, if continued, it would lead to serious injury to his health. The Court of Appeal allowed the appeal and gave leave to the husband to present his petition for divorce within three years of the marriage on the ground of exceptional hardship. The Court held that though the mere fact that conception follows on an act of adultery within three years of the marriage does not constitute in itself 'exceptional hardship' for purposes of the Act, the suffering in health of the husband could not be ignored but should be taken into account. While Hodson, L.J., thought that the Court should not confine itself to an objective view as how the ordinary man might be expected to react in given circumstances, Romer, L.J., was emphatic and laid down that each case should be approached subjectively, and that the words ' exceptional hardship ' were directed to a considerable extent if not primarily, to the possibility or probability of exceptional hardship suffered in the future by the petitioner if he had to wait the full period of three years before he can present his petition. The suggestion that the approach in each case should be subjective and not objective has much to commend it. The view of the Court of Appeal concerning adultery resulting in pregnancy for purposes of the section, however consistent it may be with the British outlook in regard to such matters, may not carry appeal with the Hindus who have been brought up in different traditions and social conditions. Among the Hindus adultery resulting in pregnancy is regarded as graver than mere adultery. To go therefore by the principles enunciated by the English decisions in regard to the construction of the words ' exceptional hardship ' in section 14 of the Hindu Marriage Act will not be warranted or salutary. The judicial mind should not be clogged by a construction which alien conditions may justify but should be free to consider the ques-

1. (1958) 2 All E.R. 261.

tion from the Hindu point of view. The decision in *Meganatha* v. *Susheela*[1], may well have emphasised the need for a subjective appraisal. Another point of interest brought out in *Hillier's case*[2] may be of value in the construction of section 14, namely, that the reference to the interests of the children of the marriage in the section should be understood as a reference to the interests of the children born to the actual parties to the marriage and not as covering those of a child born to the wife as a result of her adultery.

Under section 24 the Hindu Marriage Act makes provision for grant of maintenance *pendente lite* and expenses of proceedings to either spouse, and section 25 contains similar provisions regarding payment of permanent alimony and maintenance. It is a question of some nicety whether the benefit of section 24 can be had by the husband or wife only where such person is the applicant for the matrimonial relief and in no other case. It has been held that it need not be so, that provision for maintenance *pendente lite* may be made in favour of a needy spouse irrespective of whether such spouse appeared as the initiator of the main proceedings or not, that the husband and wife are placed on the same footing under the section and that the section permits such relief being awarded against the wife also, *Nanjappa* v. *Vimala Devi*[3], *Kamala* v. *Shama Rupchand*[4], *Annapurnamma* v. *Ramakrishna Sastry*[5].

Section 29 (2) of the Hindu Marriage Act enacts that nothing in the Act shall affect any right of divorce recognised by custom or conferred by special enactment whether the marriage had been solemnised before or after the commencement of the Act, indicating thereby that the *prima facie* object of the Act is to save divorce rights in operation earlier either by reason of custom or of special legislation. Apropos this matter, a somewhat anomalous situation had resulted in Bombay. Section 30 has repealed various enactments including the Bombay Divorce Act, 1947, under which desertion for a continuous period of four years would be a ground for divorce. Sections 30 and 29 (2) read together show that the Legislature wanted to save the rights of divorce granted to the parties under those laws which had not been repealed by section 30. In asmuch as the Bombay Hindu Divorce Act happens to be one of the repealed laws it must necessarily follow that the right of divorce arising under that enactment is not preserved. Nevertheless a large number of divorce decrees had been passed in Bombay on the basis that divorce could still be obtained on the ground of desertion under the Bombay Act despite its repeal. In *Sitabai Ramchandra Todankar* v. *Ramchandra Raghunath Todankar*[6], a Full Bench of the Bombay High Court has drawn attention to the situation and suggested that it was a proper case for the Legislature to pass a validating Act.

Apart from the legal problems that have been thrown up in the operation of the matrimonial reliefs under the Hindu Marriage Act, a more important matter for investigation is the extent to which the reliefs are being availed of, the class of persons who seek assistance and the effect of its impact upon Hindu family life. A pilot survey, as it were, was undertaken when the Act had been in operation for about three years, in May, 1958, by the Faculty of Law of the Andhra University. Three years' time is certainly too short a period to undertake such a study but it was felt that the early reaction to the provisions of the Act may be a pointer to the effect of the re-orientation of the Hindu marriage laws. Two districts, Visakhapatnam

1. A.I.R. 1957 Mad. 423.
2. (1958) 2 All E.R. 261.
3. A.I.R. 1957 Mys. 44.
4. A.I.R. 1958 Bom. 466.
5. (1958) 2 An.W.R. 382.
6. A.I.R. (1958) Bom. 116 (F.B.).

and West Godavari were selected for the purpose, the former as a district with large areas economically and culturally backward and the latter as typical of a relatively more prosperous and educationally advanced area. Through the courtesy of the judicial officers information on the basis of a questionnaire carefully prepared could be obtained. The information collated and arranged is given hereunder :

Question 1.—In how many cases did the Court acting under section 6 (5) prohibit by injunction an intended marriage in the interest of the bride, for whose marriage consent was required, during the years 1955-56, 1956-57, 1957-58?

Answer:

District Court,	Visakhapatnam	.. nil
Sub-Court,	Visakhapatnam	.. nil
Sub-Court,	Srikakulam	.. nil
District Court,	Eluru	.. nil
Sub-Court,	Eluru	.. nil
Sub-Court,	Narasapur	.. nil

Question 2.—How many petitions for restitution of conjugal rights were filed under section 9 by (i) the husband, (ii) the wife, during the years 1955-56, 1956-57, 1957-58?

Answer :		*By husband.*	*By wife.*
District Court, Visakhapatnam ..	1955	8	1
	1956	38	2
	1957	34	1
	1958 till April 26	7	nil
Sub-Court, Visakhapatnam ..	1957—58	3	nil
Sub-Court, Srikakulam ..	1955—56	26	nil
	1956—57	42	3
District Court, Eluru ..	1957—58	1	1
Sub-Court, Eluru ..	1957—58	1	nil
Sub-Court, Narasapur ..	1955—56	7	nil
	1956—57	17	3
	1957—58	10	nil

Question 3.—How many petitions for judicial separation were filed during 1955-56, 1956-57, 1957-58 under section 10, by (i) the husband, (ii) the wife, on the ground of the respondent's (*a*) desertion, (*b*) cruelty, (*c*) suffering from virulent leprosy, (*d*) suffering from venereal disease, (*e*) suffering from unsoundness of mind, and (*f*) having had sexual intercourse with a person other than his or her spouse?

Answer : District Court, Visakhapatnam

		Grounds. a	b	c	d	e	f
1955	Husband	5	..	..	..	..	..
	Wife	..	..	..	..	..	..
1956	Husband	7	..	..	..	1	..
	Wife	..	..	..	..	..	..
1957	Husband	6	1	1	..	..	..
	Wife	..	..	..	..	..	..
1958	Husband	1	..	..	..	..	..
	Wife	..	..	..	..	..	..

Court	Year	Party	Grounds: 1	2	3	4	5	6
Sub-Court, Visakhapatnam								
	1958	Husband	1	..	..	..	..	..
		Wife	..	..	..	..	..	..
Sub-Court, Srikakulam								
	1955-56	Husband	8	..	..	..	..	..
		Wife	4	1	..	..	..	..
	1956-57	Husband	6	..	..	..	..	..
		Wife	5	..	..	..	..	..
	1957-58	Husband	4	..	1	..	2	..
		Wife	1	1	..	..	..	..
District Court, Eluru								
	1955-56	Husband	..	..	..	..	..	..
		Wife	..	..	..	..	..	..
	1956-57	Husband	..	..	..	..	..	..
		Wife	..	..	..	..	..	..
	1957-58	Husband	1	..	..	..	..	..
		Wife	..	..	..	..	..	..
Sub-Court, Eluru								
	1955-56	Husband	..	..	..	..	..	2
		Wife	..	..	..	..	1	..
	1956-57	Husband	5	..	..	..	..	..
		Wife	..	..	..	..	..	..
	1957-58	Husband	..	..	..	..	..	..
		Wife	..	..	..	..	..	..
Sub-Court, Narasapur								
	1955-56	Husband	4	..	..	..	..	1
		Wife	3	..	..	..	..	..
	1956-57	Husband	9	1	..	..	..	..
		Wife	1	..	..	..	..	..
	1957-58	Husband	6	..	..	..	..	..
		Wife	1	..	..	..	..	..

Question 4 : In how many cases were the prayers granted in the above cases ?

Answer :

	1955-56	1956-57	1957-58
District Court, Visakhapatnam	1	4	1
Sub-Court, Visakhapatnam	..	..	..
Sub-Court, Srikakulam	3	3	..
District Court, Eluru	..	..	..
Sub-Court, Eluru	2	5	..
Sub-Court, Narasapur	4	4	2

Question 5 : In how many of the cases under section 10 had the marriages been solemnised before the passing of the Act and in how many cases after its passing ?

Answer : District Court, Visakhapatnam : Before 22 After 0

		Before	After
District Court, Visakhapatnam	1955	5	
	1956	8	
	1957	8	
	1958	1	
Sub-Court, Visakhapatnam	1955 to 1958	1	0
Sub-Court, Srikakulam	1955 to 1958	32	1
District Court, Eluru	1955 to 1958	0	0

Sub-Court, Eluru
1955 to 1958 8 0
Sub-Court, Narasapur
1955 to 1958 8 0

Question 6 : How many petitions for decree of nullity of marriage under section 11 were presented during the years 1955-56, 1956-57, and 1957-58, by (i) the husband, (ii) the wife, on the ground that (*a*) the respondent had a spouse living at the time of the marriage, (*b*) the parties were within the degrees of prohibited relationship, (*c*) the parties were sapindas of each other ?

Answer : None.

Question 7 : How many petitions for decree of nullity under section 12 were presented during the years 1955-56, 1956-57, and 1957-58 in respect of marriages contracted (*a*) before the Act, (*b*) after the Act, by (1) the husband, (2) the wife, on the ground of (*a*) impotency of the respondent, (*b*) lunacy or idiocy of the respondent at the time of the marriage, (*c*) consent of the petitioner or consent of the guardian where required under section 5 having been procured by force or fraud, (*d*) the respondent being pregnant by a person other than the petitioner at the time of the marriage ?

Answer : All the marriages in respect of which relief was applied for were marriages solemnised before the Act, according to all the Courts. As to other details,

District Court, Visakhapatnam		
1955 by	Husband	nil
	Wife	1 (ground a)
1956 by	Husband	3 (ground a)
	Wife	nil
1957 by	Husband	..
1957	Wife	..
1958 by	Husband	..
	Wife	..
Sub-Court, Visakhapatnam,		
1955 to 1958		nil
Sub-Court, Srikakulam		
1955 to 1956 by	Husband	2 (ground a 1 and ground b 1)
	Wife	nil
1956 to 1957 by	Husband	1 (ground b)
	Wife	nil
1957 to 1958 by	Husband	1 (ground a)
	Wife	1 (ground a)
District Court, Eluru.		
1955 to 1958		nil
Sub-Court, Eluru		nil
Sub-Court, Narasapur		
1956 to 1957 by	Husband	1 (ground a)
	Wife	1 (ground a)
1957 to 1958	Husband	1 (ground a)

Question 8 : How many petitions were presented during the years 1955-56, 1956-57, and 1957-58 by (i) the husband, (ii) the wife, for divorce under section 13 on the ground of the other party (*a*) living in adultery, (*b*) ceasing to be a Hindu by conversion to another religion, (*c*) being of unsound mind, (*d*) suffering from leprosy, (*e*) suffering from venereal disease, (*f*) renouncing the world by entering a religious

order, (*g*) not being heard of as alive for a period of seven years or more, (*h*) not resuming cohabitation for two years or upwards after the passing of a decree for judicial separation against that party, (i) failing to comply with a decree for restitution of conjugal rights for two years and upwards since the passing of the decree ?

Answer :

		Grounds.								
		a	b	c	d	e	f	g	h	i
District Court, Visakhapatnam										
1955 by	Husband	..	..	1	..	..	..	..	..	..
	Wife	..	..	..	1	..	..	..	..	..
1956 by	Husband	6	1	..	..	..	..	..	..	..
	Wife	1	..	..	..	..	..	..	..	..
1957 by	Husband	6	..	..	1	..	..	..	..	..
	Wife	..	..	..	..	..	..	..	..	..
1958 by	Husband	2	..	..	..	..	..	..	..	..
	Wife	..	..	..	..	..	..	..	..	..
Sub-Court, Visakhapatnam..nil.										
Sub-Court, Srikakulam										
1955-56 by	Husband	..	1	..	..	..	..	..	..	..
	Wife	3	..	..	..	..	..	..	..	..
1956-57 by	Husband	1	..	2	1	..	1	..	..	3
	Wife	1	..	..	3	..	..	..	..	..
1957-58 by	Husband	3	..	..	..	..	..	..	..	1
	Wife	1	..	..	2	..	..	1	..	..
District Court Eluru										
1957-58 by	Husband	2	..	..	..	..	..	..	..	..
	Wife	..	..	..	..	..	..	..	..	..
Sub-Court, Eluru										
1956-57 by	Husband	2	..	..	..	..	..	..	..	..
	Wife	..	..	..	..	..	..	..	..	..
Sub-Court, Narasapur										
1955-56 by	Husband	2	..	..	..	1	..	..	..	..
	Wife	1	..	..	..	2	..	..	..	..
1956-57 by	Husband	2	..	..	..	..	..	..	..	1
	Wife	2	1	..	..	..	..	..	..	..
1957-58 by	Husband	7	..	1	..	1	..	..	1	1
	Wife	..	..	1	..	2	..	..	..	..

Note : All the marriages had been solemnised before the passing of the Act.

Question : 9.—In how many cases were petitions presented during the years 1955-56, 1956-57 and 1957-58 by the wife under section 13 (2) for dissolution of her marriage on the ground of (*a*) the husband having married again before the commencement of the Act, (*b*) the husband being guilty of rape, sodomy or bestiality ?

Answer : District Court, Visakhapatnam		nil
Sub-Court, Visakhapatnam		nil
Sub-Court, Srikakulam	1955-56	1
	1956-57	nil
	1957-58	2
District Court, Eluru		nil
Sub-Court, Eluru		nil
Sub-Court, Narasapur	1955-56	1
	1956-57	nil
	1957-58	1

Question 10 : In how many cases was permission applied for under section 14 during the years 1955-56, 1956-57 and 1957-58 by (*a*) the husband, (*b*) the wife, for filing petition for dissolution of marriage before the expiry of three years from the date of the marriage ? In how many cases was permission granted and in how many cases refused ? In how many cases was permission granted originally cancelled subsequently ?

Answer : According to all the Courts—nil.

Question 11 : In how many cases were the proceedings under the Act conducted *in camera* (*a*) at the request of the parties, (*b*) on the Court's own motion ?

Answer : According to the Srikakulam Sub-Court, in one case alone the proceedings were held *in camera* at the request of the parties in a wife's petition alleging impotency of the respondent. In the District Court, Eluru the procedure was used in five cases.

Question 12 : In how many cases of proceedings under the Act were attempts made by the Court under section 23 to bring about a reconciliation between the parties and with what measure of success ?

Answer : Attempts seem to have been made in all the cases. In the District Court, Visakhapatnam the attempts seem to have succeeded in about 16 cases out of 25. In Srikakulam Sub-Court, in 20 cases the attempts succeeded and in the District Court, Eluru, success attended the efforts in four cases.

Question 13 : In how many cases during the years 1955-56, 1956-57 and 1957-58 were orders passed under section 24 directing payment of maintenance *pendente lite* and expenses of proceedings (*a*) by the husband to the wife, (*b*) by the wife to the husband ?

Answer : According to all the Courts in no case was the wife directed to pay. According to the District Court, Visakhapatnam payment by the husband to the wife was ordered in 1956 in seven cases, in 1957 in eight cases and in 1955 in five cases. In Srikakulam such payment was ordered in 1955-56 in one case, in 1956-57 in four cases, and in 1957-58 in two cases. In the District Court, Eluru, it was ordered in two cases in 1957-58, and in Narasapur, it was ordered in one case in 1955-56, in eleven cases in 1956-57 and in four cases in 1957-58.

Question 14 : In how many cases during the years 1955-56, 1956-57, and 1957-58 were permanent maintenance and alimony ordered to be paid under section 25 by (*a*) the husband to the wife, (*b*) by the wife to the husband ?

Answer : In one case during 1956-57 such order for payment by the husband to the wife was made in Srikakulam. No orders were made by any of the other Courts.

Question 15 :—In how many cases during the years 1955-56, 1956-57, and 1957-58 were orders passed under section 26 for the custody of the children of the marriage and in what manner ?

Answer : In one case only in the District Court, Visakhapatnam, a petition was preferred by a father for the custody of a minor son but the application does not seem to have been pressed. No orders under the section fell to be passed by any of the other Courts.

Question 16 :—In how many cases during the years 1955-56, 1956-57, and 1957-58 were orders passed under section 27 for the disposal of property and in what manner ?

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Answer.—No order fell to be passed under the section in any of the Courts.

Certain features emerge clear from the survey. Men seem to have sought relief in larger numbers than women. The phenomenon may be due to the fact that the traditions and upbringing of Hindu women in the past have been such as to inculcate reverence towards the husband, and a spirit of tolerance of what he does. Temperamentally also Hindu women are averse to airing their grievances against their spouses in public. It may be also due to the fact that women feel a sense of handicap in the matter of conducting litigations, particularly, at places often remote from their residence.

According to the remarks offered by the concerned judicial officers the persons seeking matrimonial relief seem to have been drawn mainly from the poorer classes and a few from the middle classes while there has been rarely any case from the richer classes. In Srikakulam the litigants were found to be economically backward and drawn from the ranks of cultivators. The women in such communities are also earning members and are not so much dependent on men as in other communities, and hence do not feel averse to get out of a matrimonial life that is proving unsatisfactory. In one case alone from Eluru, it was found that the husband was a Government servant and the wife a teacher.

In regard to the measure of success attending the efforts of the Court to reconcile the parties, the opinions given show a certain amount of variation. The Subordinate Judge at Visakhapatnam thought the procedure useful. The Subordinate Judge at Srikakulam stated that the attempts were generally successful; the District Judge at Eluru referred to them as very often successful. The Subordinate Judge there however felt that the attempts were rarely successful while the Judge at Narasapur has opined that in about 10 per cent. of the cases the attempts have proved fruitful.

The main ground on which matrimonial relief has been generally sought is marital infidelity. Diseases form the next major ground. It may be that with increasing sophistication in Hindu society all the grounds set out in section 13 may come to be urged.

The *in camera* procedure does not seem to have been availed of much. This may be due to the fact that the classes who applied for relief in the past were economically and culturally backward. Similarly the possibility of a husband getting interim or permanent maintenance from the wife has not been exploited, showing that men still entertain a certain amount of delicacy in the matter. Probably the provision is in advance of the times.

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PROCEDURAL DUE PROCESS OR PROCEDURAL SAFEGUARDS AS A FUNDAMENTAL RIGHT IN THE CONSTITUTION*

By

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The Constituent Assembly of India, while conveniently avoiding using the word 'Due Process' either in providing safeguards for protecting substantive rights in the main body of the Constitution or providing for safeguards regarding procedural rights, nevertheless provided that the Constitution shall be carried under authority of law or procedure established by law.

In laying down standards by which yardstick the liberty or freedom of an individual, whether citizen or alien, is to be judged, and the safeguards provided for the protection of liberty of person and property, the Indian Constitution has virtually preserved the 'Due Process' clause of the American Constitution in regard to substantive and procedural rights of the citizen as well as the alien.

In regard to Procedural Due Process, the Constitution has virtually provided, in the words of Weaver on "Constitutional Law," page 411, for an 'orderly proceeding according to established rules which do not violate fundamental rights, and a general law administered in its legal course according to the form of procedure suitable and proper to the nature of the case, conformable to the fundamental rules of right and affecting all persons alike in due process'. Notice, summons or other process, a hearing, granting an opportunity to be heard, and to defend in an orderly proceeding before a Court or other tribunal having jurisdiction of the cause and which renders 'judgment only after trial,' are some of the characteristics of Procedural Due Process. It may be a trial by Jury or by Court and proceedings to condemn land may be before special tribunals and notice of proceedings may be made by publication and notice of tax procedings may be given and opportunity given to be heard in tax proceedings. When there is excess of due process, *i.e.,* when there is need to enact measures to relieve the needs, social, political and economic, in society *i.e.*, to achieve social justice, the doctrine of 'Police power' was evolved in public interest in order to regulate private rights. (*Patanjali Sastri, J.*, in *Gopalan* v. *State of Madras*.[1])

There is evidence of both Due Process as well as 'Police power' in the chapter on Fundamental Rights in the Indian Constitution and the two sets of rights are kept balancing each other.

The Constituent Assembly of India wanted to provide not merely substantive safeguards in the Constitution to see that the executive did not misuse the discretion conferred on them in the matter of dealing with the property, life and liberty of any person in India but made provision for a duty on the part of the executive to lay down certain standards or rules of procedure in dealing with them and to observe them. While some of the provisions relating to fundamental rights apply only to citizens, such as Articles 15, 16, 19, 29, 30, the other provisions of Part III of the Constitution apply to citizens and foreigners alike, to all persons residing in the

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1. (1950) S.C.J. 174 : (1950) 2 M.L.J. 42 : A.I.R. 1950 S.C. 27, 73.

territory of India for the time being, and subject themselves to its jurisdiction, *e.g.*, the provision under Article 21 for the protection of the life and personal liberty of all persons, citizens and non-citizens.

Under Articles 12 and 13 of the Constitution, no law, rule, regulation, order or bye-law of any authority including both legislative and executive organs of the State can take away or abridge the rights conferred by Part III and all laws in force which are inconsistent with Part III before the commencement of the Constitution, shall be void to the extent of the inconsistency and therefore procedural as well as substantive laws which were pre-Constitution laws are not void *ab initio* but void only regarding future exercise of the fundamental right. Article 13 (1) cannot be read as obliterating the entire operation of the inconsistent laws, or to wipe them out altogether from the statute book, for, to do so will be to give them retrospective operation which, we said, we do not possess, *Keshavan* v. *State of Bombay*[2]. It seems clear that an existing statute in spite of the declaration by Court that it is void, remains in force till 25th January, 1950 and continues to remain on the statute book even after 26th January, 1950, except that no effect can be given to any of its provisions which are repugnant to the fundamental rights guaranteed by the Constitution.

The guarantee under Article 13 therefore, is only prospective and not retrospective and the inconsistency referred to in Article 13 (1) does not affect transactions closed before the commencement of the Constitution. But nevertheless an unconstitutional procedure need not necesssarily be followed in respect of pending proceedings or in regard to proceedings started after the commencement of the Constitution, though the procedure laid down in a pre-Constitution Act, especially when that procedure is discriminatory and conflicts with a fundamental rght as the right of equal protection under Article 14, *Lachmandas* v. *State of Bombay*[3]. The procedure to be followed in a case which arose before the commencement of the Constitution, even though that law was valid before, must conform to the principles of the Constitution, and the prosecution for the offence after the Constitution came into being, can take place only under a procedure valid under the provisions of the Constitution.

But all post-Constitution rules, orders or bye-laws, must not only not be repugnant to the statute which authorised them, but must also be reasonable restrictions under Article 19 of the Indian Constitution. To this, proceedings under Articles 21 and 22 are exceptions, as in the words of the majority judgment of the Supreme Court in *Gopalan's case*.[3-a] Article 21 is an independent Article, and has no relation to 'reasonable restriction' provided in Article 19. This view has been subsequently upheld in the later case of *Ramsingh* v. *State of Delhi*.[4]

Article 19 mentions the seven freedoms which are the fundamental rights of every citizen of India which come generally under the term 'Liberty'; but Article 21 speaks of deprivation of life or of personal liberty which cannot be done except according to procedure established by law. The word 'due process of law' has been omitted. The object of Article 21 is to serve as a restraint upon the executive so that it may not proceed against the life or personal liberty of the individual except under the authority of some law and

2. (1951) S.C.J. 182 : (1951) 1 M.L.J. 370 : (1951) S.C.R. 228.

3. (1952) S.C.J. 339 : A.I.R. 1952 S.C. 235 (245 *Das, J.*).

3-a. (1950) S.C.J. 174 : (1950) 2 M.L.J. 42 : A.I.R. S.C. 27.

4. (1951) S.C.J. 374 : A.I.R. 1951 S.C. 270.

in conformity with Article 22. Article 21 of the Constitution read with Article 22, exhaustively deals wih the deprivation of life or personal liberty, as distinguished from 'restriction' of the right of movement freely througout the territory of India, which is dealt with in Article 19 (1) (*d*) and (5). *Gopalan* v. *State of Madras.*[4-a]

The Constitution does not guarantee the right to any particular procedure for the deprivation of life or personal liberty, besides those contained in Article 22. The legislature is free to lay down any procedure within the ambit of the legislative power conferred by Entry 2 of List III (Criminal Procedure) subject, of course, to the limitations prescribed in Articles 14, 20 and 22. The Courts have no power to invalidate a legislation on the ground that the procedure laid down therein is arbitrary, but the Supreme Court of India has interfered in cases where the rules of procedure laid down in the statutes under which the executive act, are not strictly followed by them. *Makham Singh* v. *State of Punjab*;[5] *Naranjan* v. *State of Punjab*[6]. The Court has the power to see if the Rules are followed and exercised in good faith. The Court has the right to interfere, where a person is deprived of liberty otherwise than according to procedure established by law. This principle has been applied both in cases of punitive as well as preventive detention. *Ram Narayan* v. *State of Delhi*[7], *Maqbul Hussain* v. *State of Bombay*[8], *State of Bombay* v. *Atmaram.*[9]

Articles 21 and 22 are qualifications on the right of freedom conferred under Article 19. Once a man's liberty is lawfully deprived under Article 21 or Article 22, he loses his capacity to exercise his freedom under Article 19, and cannot complain that his rights have been taken away, *Gopalan* v. *State of Madras*[4-a]; *State of West Bengal* v. *Subodh Gopal*[10-11]. The procedure laid down in Articles 21 and 22 has to be strictly followed.

The Courts in India have insisted on certain procedural safeguards being inserted in the legislation intended to be implemented by the executive, before declaring that the executive have constitutionally exercised the discretion with which they have been invested. The Fundamental Rights have afforded a basis to the judiciary to determine whether both substantive and procedural safeguards have been inserted in the legislation that the executive is expected to enforce. The substantive part is examined to see whether the discretion conferred is within prescribed limits. The Procedural part is examined to find out whether there are necessary safeguards subject to which the executive or the administrator are expected to exercise their discretion. *Dr. Khare* v. *State of Delhi.*[12]

In *Virendra* v. *The State of Punjab,*[13-14] the Supreme Court in a question arising under Article 19 (1-A) and (2) (Freedom of Speech,) held that the executive must be given discretion to curtail freedom of speech on condition that the principle on which the executive exercised its power should be laid down by the Legislature, and that it should be limited in point of time, *i.e.*, of short duration, and that the person aggrieved should have a rihgt of making representation for the consideration of the executive. The Allaha-

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4-a. 1950 S.C.J. 174 : (1950) 2 M.L.J. 42 : A.I.R. 1950 S.C. 27.
5. 1951 S.C.J. 835.
6. (1952) S.C.J. 111 : (1952) 1 M.L.J. 733 : (1952) S.C.R. 395.
7. (1953) S.C.J. 326 : (1953) S.C.A. 399.
8. (1953) S.C.J. 456 : (1953) 2 M.L.J. 113 : (1953) S.C.R. 730.
9. (1950-51) S.C.C. 130 : 1950 S.C.J. 208.
10-11. (1954) S.C.J. 127 : 1954 S.C.A. 65.
12. (1950) S.C.J. 328 : A.I.R. 1950 (S.C.) 211 : (1950) S.C.R. 519.
13-14. A.I.R. 1957 (S.C.) 696.

bad High Court in the case of *State of Babooli*[15] held that the Dramatic Performances Act of 1876 was bad, because its procedural part imposed such restrictions on fundamental rights which were opposed to Article 19 (2).

In the case of *Ebrahim Vazir* v. *Bombay,*[16] the Supreme Court of India held "that section 7 of the Act which empowered the Government to remove any person from India who was suspected to commit the offence, was *ultra vires,* Section 19 (1) (*e*) and 19 (*s*) as the procedural formality of issuing a previous notice regarding the suspicion, in order that he may rebut it, or an opportunity given to him for clearing the suspicion was not given to him, which is a travesty of the right of citizenship."

In the case of *Khare* v. *Delhi,*[17] the Supreme Court, while holding that the order of externment was valid, was of the view that if the order of externment was for a longer duration, there was necessity for more procedural safeguards, such as service of the grounds of externment and giving him an opportunity to make representations and consideration of the material by an Advisory Board.

The necessity for having procedural safeguards, was stressed by the Supreme Court as an essential aspect of legislation giving wide powers of discretion to the executive in the matter of externment in the cases of *Gurbachan* v. *Bombay,*[17-a] *Bajbai* v. *District Magistrate,*[17-b] and *Hari* v. *Deputy Commissioner of Police.*[18]

In *Bijoy Cotton Mills* v. *Ajmer,*[19] the Supreme Cocrt held that the Minimum Wages Act contained sufficient procedural safeguards such as the Government's obligation to accept the recommendations of the Advisory Committees or Boards consisting of the representatives of the employers and employees and representation of persons affected, and the existence of the Central Advisory Board to advise the Centre and the States.

The Supreme Court in *Dwarka Prasad* v. *The State of Uttar Pradesh,*[20] held, that sufficient procedural safeguards in the matter of licencing at the discretion of the executive should be provided and that there should be provision for a right of appeal or revision.

In *Pannalal Bag* v. *Union of India,*[21] the Supreme Court laid down that Income-tax authorities should give notice to the party affected and afford him a reasonable opportunity to represent his case, and provide for reducing into writing the reasons for ordering his transfer.

It cannot be held as an inflexible rule, that every law which gives authority to the executive to encroach on fundamental right, must necessarily give an opportunity to the person concerned to be heard before an order is made to his prejudice. The question will depend on the nature of the legislation and the extent to which the fundamental right is contravened.

In the case of a legislature dealing with urgent situations, like flood or earthquake or an epidemic, a provision for an elaborate enquiry may not necessarily be made but in cases where there is no compelling urgency or necessity, the legislation should ordinarily prescribe a procedure observing

15. A.I.R. 1956 All. 571.
16. (1954) S.C.R. 933 : A.I.R. 1954 S.C. 229.
17. (1950) S.C.J. 328 : (1950) S.C.R. 519 : A.I.R. 1950 S.C. 211.
17-a. A.I.R. 1952 S.C. 222.
17-b. 1956 S.C.J. 565 : A.I.R. 1956 S.C. 585.
18. (1956) S.C.J. 599 : A.I.R. 1956 S.C. 759.
19. (1955) S.C.J. 51 : (1955) 1 M.L.J. (S.C.) 10 : A.I.R. 1955 S.C. 33 : (1955) S.C.R. 752.
20. (1954) S.C.J. 238 : (1954) S.C.R. 803.
21. A.I.R. 1957 (S.C.) 397 : (1957) S.C.R. 233.

the principles of natural justice, *Jayantilal* v. *State of Saurashtra*.[22] The want of opportunity of being heard, the absence of a provision for appeal, and remedy in civil court have all been said to be unreasonable restrictions on fundamental right. *W. B. S. K. Co-operative Credit Society* v. *Bella*,[23] *Deodat Rai* v. *State*,[1] *Jeshugbhai* v. *State*,[2] In re *Shanta Bai*,[3] *Mulchand* v. *Mukand*,[4] *Annati Sadhe Khan* v. *A. K. Chatterjee*,[5] *Ismail* v. *State of Orissa*,[6] and *Tozmal* v. *Government of West Bengal*,[7] it was held that provision for some procedure or tribunal for consideration of the representation that may be made by the person aggrieved is essential. The absence of such a provision would render the law unreasonable. It has been held in *Madanlal* v. *State*,[8] that although there may be a provision for making rules, so long as such rules are not made providing a reasonable procedure, the restrictions imposed will be bad.

While our Constitution does not guarantee the right to any particular procedure for the deprivation of life or liberty, besides those contained in Article 22, the legislature is left free to lay down any procedure within the ambit of its authority, and the legislature is free to create special criminal Courts for the trial of particular offences, but also empower the executive to decide what offences or classes of offences shall be tried by the special courts. There is under the Indian Constitution no guarantee of any right of trial in the ordinary courts of law or the right to access to the ordinary courts as in Switzerland, China, Japan and Germany, or as interpreted to mean by the term 'Due Process' by American Courts. But our Constitution does envisage, that Procedural Safeguards are a condition precedent to the preservation of the fundamental right of the citizen, and in the case of the life and liberty of the alien too.

MANAGING AGENCY SYSTEM UNDER COMPANIES ACT (I of 1956)

By

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When the Companies Act (I of 1956) was passed, containing a large number of stringent provisions, especially those relating to managing agents such as requiring the previous sanction or approval of the Central Government for such matters as appointment or re-appointment of managing agents, variation of the terms of the managing agency agreement, changes in the managing agency firm or corporation, limitation of their overall remuneration to ten per cent. of net profits, prohibition of receipt of commission as buying or selling agents and so on, a good many managing agents of companies felt uneasy over the new legislation and not a few who apprehended undue interference by Government into some of their ways and activities were visibly perturbed. Soon however under skilled advice and through a thorough grasp of the exact scope of the relevant provisions of the Act affecting their rights, remuneration and privileges they became inspired with new hopes, and scarcely before a year had elapsed after the coming into force of the Act, found themselves once again masters of the situation. In their new outlook they were also not a little encouraged by what I may call the phil-capitalist and friendly-to-the-managing-

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22. A.I.R. 1952 Sau. 59.
23. A.I.R. 1951 Cal. 111.
1. A.I.R. 1951 All. 718.
2. A.I.R. 1950 Bom. 363.
3. A.I.R. 1951 Bom. 337.
4. A.I.R. 1952 Bom. 296.
5. A.I.R. 1951 Cal. 90.
6. A.I.R. 1952 Orissa 986.
7. A.I.R. 1951 Cal. 322.
8. A.I.R. 1953 Raj. 162.

agency-system attitude exhibited by the Department of Company Law Administration as well as its zonal representative, the Regional Director of Companies, whose guidance and advice as regards the interpretation and application of the provisions of the Act would seem to have always been favourable to the interests of the managing agents *vis-a-vis* the interest of the shareholders.

The first thing which the managing agents, especially the multi-millionaire managing agents of textile companies who are typical of the lot, did, was to manage to get over the provisions of sections 356 to 359 which prohibited their being appointed as selling or buying agents of the companies under their management and receiving any commission in respect of goods sold or materials or machinery bought by the company. Emphasis was laid on the fact that the provisions of the Act only required that they should not act as *agents*. "There is nothing", so they argued, " to prevent us acting on a principal to principal relationship. Why not we buy from outsiders, cotton, machinery and all goods required by the company and supply them to the company at a handsome percentage of profits to ourselves. In doing so, surely we don't act as *agents* but only as seller to a buyer and this is not prohibited by the Act. Similarly what prevents us from acting as buyer of the yarn, cloth, waste, scrap, etc., of the mills at such prices as will give us a decent margin and then dispose of the goods to outsiders on our own terms." The thesis was developed and perfected with a wealth of specious argument, and one or more special resolutions apparently satisfying the provisions of section 360 of the Act but hoodwinking the requirements thereof, were got passed either at the annual general meeting next following the passing of the Act or at an extraordinary general meeting convened for the purpose.

As is well known, very few shareholders attend any general meeting of companies unless there are factions in the management or the directorate and each faction campaigns for canvassing votes and brings in voters to support its own cause. Both as legal adviser of several companies and shareholder in many, the present writer has yet to know of any meeting, at any rate in mofussil places, of a company whose shareholders on their own initiative have gone and attended and exercised their voting rights. Even in the case of companies having thousands of members, not more than a dozen or score attend ; and of these, excepting one or two or three, all the others are either employee-shareholders or other 'yes-men' sent for by the managing agents to be present at the meeting. In some cases there would not even be a sufficient number to form a quorum. In order to avoid this difficulty the quorum in the case of most companies has been fixed at as low as five members—the minimum required by the Act. The case of companies in Bombay or Calcutta may be different.

The practice in this part of India has always been for the managing agents to put forward their own partners where the managing agent is a firm, or directors or members where the managing agent is a body corporate, as candidates for directorship and have them appointed or re-appointed as directors at the annual general meetings ; and so long as there is harmony between the managing agents and the directorate (the clever-headed managing agents have always endeavoured to maintain such harmony)—there has never been any difficulty in getting any resolution or special resolution passed as desired by the management. In the rare event of a recalcitrant or dissentient director raising his head, if it is found that he cannot be bought off, he seldom finds it possible to get re-appointed at the next annual general meeting.

Where there is complete harmony and identity of interest between the Board of Directors and the managing agents, the provisions of the Act and the elaborate articles and the ostentatious terms of the managing agency agreement requiring that the managing agent should act under the superintendence, control and direction of the Board of Directors become an empty formality having no meaning or significance. In fact it is the Board of Directors that functions under the control and

direction of the managing agents, and it is no exaggeration to say that the managing agents make and unmake the directorate.

Though this kind of development, *viz.*, the directorate consisting mostly of the partners or associates of the managing agents and functioning under the direction and control of the managing agents instead of controlling and directing them, was not contemplated by the framers of the Act, yet that is the actual situation obtaining, at any rate in the case of public companies managed by managing agents in South India.

Under such circumstances the managing agents of such companies getting any resolutions or special resolutions passed by the managed company in general meeting either sanctioning or approving anything either prospectively or retrospectively, has become a matter of course, and no one should be deceived by the apparently stringent nature of the legal provisions in respect of them. Even in these rare cases where one or two or a few shareholders raise their heads and object to the passing of this or that resolution, the managing agents and their nominees and relatives who almost invariably hold a decent fraction of the equity share capital and always take care to obtain and keep ready a sufficient number of proxies, silence the dissentients by the combined use of their own votes and those of the proxies and carry the day.

Acting as sellers to and buyers from the managed company has been a very great and substantial source of profit to the managing agents, and it is this, more than anything else, which has contributed, is contributing and will continue to contribute to their position of millionaires and multi-millionaires in this country. While before the new Companies Act they were making these profits as *agents* as per terms of their managing agency agreement, they are now making them as sellers to and buyers from the company. It is a fact to be noted that in actual practice, in the case of very many companies the managing agents—whether individual, firm, or body corporate, have resorted to the device of constituting themselves and their associates into a number of business entities for the purposes of selling goods and rendering services to or buying goods from the companies under their management.

With a view to make a show of legality in their transactions it has become usual for them to get some such special resolution as the following passed by the company in general meeting as though in compliance with section 360 of the Act :—

"Resolved that in accordance with the provisions of section 360 of the Companies Act, 1956, the Company hereby approves of all contracts entered into or to be entered into by the Company with the following institutions and individuals, who are associates of Messrs. . . . the Managing Agents of the Company for the sale, purchase or supply of any property, moveable or immoveable or for the supply or rendering of any service, in the case of the former on terms of ready and forward delivery and either for cash or for deferred payment at rates which are not less favourable to the Company than the prevailing market rates or which are otherwise reasonable. The goods so supplied or sold or any services supplied or rendered by the Company to the said associates shall be paid for within one month from the date of supply or sale of the goods or supply or rendering of the service."—(*Resolution* adopted by a group of well-known textile companies in South India.)

No doubt a resolution like the above does not not comply with the requirements of section 360 of the Act. But who is there to question the legality or propriety of it ? Individual shareholders with their small stakes in the company are usually apathetic and may not like to litigate at their own expense for a common cause. The Registrar with his meagre staff, who has to deal with thousands of companies is concerned primarily with the regularity of filing and registering documents in his office, and getting his prescribed fees. And there is no penalty or effective machinery provided in the Act to punish the contravention of any of the sections 356 to 360, the only provision in section 363 providing that a managing agent receiving any remuneration in contravention of those sections should account to the

company for the same as if he was a trustee. The question is who is going to take action against the managing agents.

The resolution quoted above from a well-known company employs in all seriousness the words used in section 359 to the effect that the prices charged to or received by the company should not be less favourable to the company than the market rates or should otherwise be reasonable. But there is no machinery or means provided for verifying whether the prices paid or received by the company are fair or reasonable having regard to the market rates, nor for checking the quality of the goods or materials or services. The directors are the managing agents' own men and the auditor is neither charged with that duty nor competent to discharge it. The result is that the whole matter of buying and selling and servicing is left to the good sense and honesty of the managing agents, whose self-interest as sellers or buyers must necessarily conflict with their duty of buying and selling on behalf of the company at best rates favourable to the company.

This one point is enough to condemn the managing agency system except in the case of companies functioning with a thoroughly independent directorate capable of exercising real check over the management.

One other matter in respect of which the managing agents of companies evade with contumacy the provisions of the Act is the way in which they make loans and advance to themselves in the teeth of the provisions of sections 295 and 369 which prohibit the making of loans to directors and managing agents. What in fact they do is that instead of directly taking loans and advances they draw large amounts from the company as for the transactions of sales, purchases and supply of services to the extent of many lakhs of rupees every year. But in the Balance Sheet the overdrawings due by them at the end of each year are shown as "advances due by directors" but in reality the amounts are due by the partners of the managing agency firm or directors or members of the managing agency company and the fact that the amounts are due by the directors who are partners or other associates of the managing agents is concealed from the shareholders and the Registrar. And the auditor to whom patronage is extended by the managing agents in many ways does not also disclose in his report the true nature of the so-called "advances due by directors" but screens the true nature of the transactions by boldly saying that they are only book-debts exempted by section 296, though in reality all loan transactions, whatever their nature, relating to the managing agents are prohibited under section 369, and punishable under section 371.

Whatever the usefulness of the managing agency system in the past, it has, under present conditions, become a drag on the economic organisation of the country in its present set-up. There is no reason why we should not adopt the same method of management as is followed in western countries, *viz.*, management by executive directors or managing directors or governing directors by whatever name you call them instead of the costly effete and inefficient system of management by unskilled managing agents. If industrial development through joint-stock companies is to be efficient the whole of Chapter III of Part VI of the Companies Act has to be scrapped.

THE RIGHTS OF AN ILLEGITIMATE SON OF A SUDRA BY A WOMAN OF A TWICE-BORN CASTE

By

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In *Rahimtola* v. *Nizam of Hyderabad*[1], the House of Lords were divided upon a number of questions, most of which are not relevant to this article, but not the least interesting was the problem whether a Judge may found his judgment upon questions and authorities not raised or cited by counsel and not appearing in the judgment of the Court of first instance or the lower appellate Court, if any. Lord Denning, characteristically, took the view that the Judge's responsibility was not confined to the path indicated by counsel, but the majority of his brethren indignantly repudiated this doctrine. Academic opinion is solidly in favour of Lord Denning's view[2], for it seems obvious that there is a presumption that the Judge knows the law. The advocate's duty to rehearse before him the authorities and arguments which existing legal knowledge provide and experience indicate is no substitute for the Judge's own obligation to persist with enquiry and research, so long as there is the slightest possibility that counsel's reactions to propositions put to them from the Bench may not have been maturely meditated, and that there exist authorities which might have a direct bearing on the issue in question but have not appeared in counsel's prepared briefs. The Madras High Court, if it had been asked this very question in 1870 or thereabouts, could have made only one answer : at that period Judges such as Mr. Justice Holloway were perpetually framing their judgments with reference to considerations drawn from a multitude of quarters, many of which must have been, at their first citation from the Bench, a surprise to counsel. The Judge at that period felt free to cite Roman, French, German and other laws from his private library and if counsel would keep pace with him he must be an agile linguist as well as a legal philosopher.

It is unfortunate that in a very recent case a division bench of the Madras High Court, Panchapakesa Ayyar and Basheer Ahmed Sayeed, JJ., in *Velu Niranjan* (*Minor*) v. *Alagammal and others*[3], misstated the Hindu Law on a point which is, though not covered by direct authority, so plainly dealt with in cases upon closely analogous points that it is virtually settled law. Since the legal position of the parties to that litigation will be severely affected by the misstatement, and since similar cases may arise in some numbers, it is desirable that the error should be pointed out at the earliest opportunity. The error was, of course, due to counsel's failure to make the correct responses to questions from the Bench.

Slightly simplifying the issue for convenience of exposition, the question was whether the plaintiff was an heir, and might, after the death of the surviving spouse be the sole heir and trustee of *P*, a Hindu male, a Sudra by caste. The learned Judges decided that the plaintiff would be the sole heir, and that he already had a very substantial interest in the estate of *P*, his father. This, it is respectfully submitted, is incorrect, for in the circumstances as found *P* died intestate as to a large portion of his estate (part of which was subject to trusts for religious purposes), leaving his widow, a legitimate daughter and the plaintiff, his son by a woman who was not his wife but had been in his keeping for six years and more, and had been in his continuous keeping at the time of the plaintiff's conception. The plaintiff was thus a *dasiputra* of a Sudra. But since the mother was a member of the Kshatriya caste, the unfortunate lad was not merely illegitimate, but also the issue of reprobated union, a *pratilomaja*, for his mother was of higher caste than his father. Their Lordships rightly held that no marriage between the parents would have been possible

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1. (1957) 3 W.L.R. 884, H.L. (E) : (1957) 3 All E.R. 441.
2. See, *e.g.*, A.J. Bland in 7 *International and Comparative Law Quarterly*, Jan. 1958, at p. 187.
3. (1959) 1 M.L.J. 265.

at the time (this was prior to the enactment of the Hindu Marriage Act), and that the pathetic ceremony at which the father-to-be tied a *tali* round the neck of the Kshatriya lady who was to be the plaintiff's mother was no marriage at all (notwithstanding its taking place in a temple, and, presumably in the presence of at least one witness) : for such a ceremony could be equally consistent with an intention to commence a concubinage, and no custom supporting marriage between castes in this order had been proved.

It is well known that the *dasiputra* of a Sudra can in certain circumstances claim a share, or even the whole of his father's estate[4] or could so claim if his father died before the coming into force of the Hindu Succession Act, 1956, which abolished the *dasiputra's* privilege. As their Lordships remark, unions between persons of different castes were becoming more common during the decades preceding the enactment of the ' Hindu Code ', but the Hindu Law itself did not prove elastic enough to permit such unions without the aid of statute. Custom occasionally assisted the parties, but disappointment is all too-frequently traceable in recent case-law. A marriage between a Kshatriya woman and a Sudra man was void, and the issue illegitimate : but a question arises as to whether a son of such a union would be a *dasiputra* within the meaning of Yajnavalkya II, 133, and as such capable of inheriting from his father or partaking in the joint family property. In three places in their judgments in *Velu's case*[5], the learned judges repeat that the plaintiff was entitled ultimately to one half of the estate as against the widow and the daughters. The assumption was, no doubt, that the Hindu Women's Rights to Property Act, 1937, was not applicable and that question will not be raised here. In their view the illegitimate son of a Sudra by a *dasi* of the Kshatriya caste was a heritable *dasiputra*. But this is not correct. Counsel appear to have omitted to cite *Datti Parisi Nayudu* v. *Datti Bangaru Nayudu*[6], *Ramachandra* v. *Hanam Naick*[7] and *Mahabir Prasad* v. *Raj Bahadur Singh*[8]. Reference was made to the Privy Council decision in *Kamalammal* v. *Visvanathaswami Naicker*[9]. But it was not observed that their Lordships in that very case cite texts (which they misleadingly say were not of governing authority in Madras—whereas they had been relied upon in *Datti Parisi Nayudu*[6], and were thus authoritative even for Madras) which showed how the fundamental text of Yajnavalkya was understood, and which make it clear that the Sudra's illegitimate son by a concubine of a twice-born caste it totally excluded from succession on intestacy.

In *Datti Parisi Nayudu* v. *Datti Bangaru Nayudu*[6], the principal question was whether an incestuous bastard could inherit from a Sudra father. In negativing this proposition their Lordships refer to the *Dayabhaga* of Jimutavahana, the *Smritichandrika*, and to Jagannatha's *Vivadabhangarnava*, otherwise known as *Colebrooke's Digest*. Some of these texts make the general proposition namely that the son of a *pratiloma* marriage can never inherit, though he may be maintained. Others point out that the *dasiputra* of a Sudra must be the son of a mother of the Sudra caste. The *dasi* is regarded by the *dharmasastra* as the ' unmarried wife ' of the Sudra for this limited purpose, and it is therefore quite legitimate to discover the meaning of the fundamental text of Yajnavalkya with reference to texts bearing upon the inheritance-claims of children of void marriages. In our case the ceremony was no marriage at all, and even if the ceremony had been perfect in point of form it would not have affected its validity[10]. If the sons of marriages void for *pratilomatwe* are excluded it follows that the sons of Sudras by kept concubines of a higher caste are excluded, and this provision is an exception to the wide terms of Yajnavalkya's text. As if to eliminate any possibility of doubt Jagannatha says[11] :

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4. *P. V. Kane : History of Dharmasastra*, iii, 1946, 600 fol.
5. (1959) 1 M.L.J. 265 at 266, 268, 269.
6. (1869) 4 Mad. H.C.R. 204.
7. (1936) I.L.R. 60 Bom. 75 : 37 Bom.L.R. 920.
8. (1942) I.L.R. 18 Luck. 585.
9. (1922) L.R. 50 I.A. 32 : I.L.R. 46 Mad. 167 : 44 M.L.J. 465.
10. See the informative discussion of the whole matter by Balambhatta on Mit. on Yajn. I, 94, Trans. by Srish Chandra Vidyarnav, (Allahabad, 1918), p. 193-200.
11. *Colebrooke's Digest*, Madras edition of 1865. II, 325, Text CLXXIV.

"Consequently a son by a female slave, not superior in class to her Sudra master shall obtain the moiety of a full share. Such is the opinion delivered in the *Mitakshara* and *Ratnakara*". It is comforting to find in this context that there is no difference of view between the two major schools of *dharmasastra*, the Bengali and Maithili authors adopting the same attitude and applying the same tests. In *Datti Parisi Nayudu*[12] their Lordships say, upon the authority of the texts, that the son of a Sudra by a twice-born woman would be excluded from participating in the inheritance of his natural father. With respect, this is perfectly borne out by the authorities they cite, and has been confirmed by the judgment in *Ramachandra* v. *Hanam Naik*[13].

In *Ramachandra case*[13] the question was whether the illegitimate son of a Sudra by a Brahmin concubine could inherit. It was held by Divatia, J., that he could not. The difference between a Brahmin concubine and a Kshatriya concubine is now negligible. The fact that the issue of a Brahmin woman and a Sudra man is a *chandala*, but that of a Kshytirya woman and a Sudra man is less loathsome in orthodox eyes is no longer relevant. At one time it was felt that the *dasi* ought to be a slave, but that view, retained for some time in Bengal, was abandoned in Madras as early as *Muttusamy Jagavira* v. *Venkatasubha Yettia*[14], and has no relevance except in so far as the fact that a Brahmin could not be enslaved being well known to the *dharmasastris*, it was obvious that a Brahmin woman could not *at any period* have been contemplated as the mother of a heritable *dasiputra*. But this point has never been of importance since it has been accepted on all hands that the the *dasiputra's* mother might be free to leave her paramour at any time after the son's conception. *Ramchandra's case*[13] is therefore virtually on all fours with *Velu Niranjan's case*[15], and ought to have been cited in argument. That the non-Sudra *dasi* could not be the mother of a heritable *dasiputra* is accepted without question by the Privy Council in *Kamalammal's case*[16] though there the question was only of the size of the share available for a genuine, heritable *dasiputra*.

Thus it is submitted that the plaintiff was not interested in his father's estate beyond the right to maintenance for life, to which any illegitimate son of a father of any caste by a mother of any caste is entitled, once his paternity is established. The position in the case of the estate of one who dies after the coming into force of the Hindu Adoptions and Maintenance Act, 1956, differs but we are not concerned with that problem in this context.

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12. (1869) 4 M.H.C.R. 204, 215.

13. (1936) 60 Bom. 75 : 37 Bom.L.R. 920. Followed in *Mahabir Prasad* v. *Raj Bahadur Singh*, (1942) 18 Lucknow 585.

14. (1865) 2 M.H.C.R. 293.

15. (1959) 1 M.L.J. 265.

16. (1922) L.R. 50 I.A. 32, 38 : I.L.R. 46 Mad. 167, 174 : 44 M.L.J. 465.

BOOK REVIEW.

LAW OF LIMITATION AND ADVERSE POSSESSION, *By* K. J. RUSTOMJI, 6th edition, by J. L. JOSHI, 1958, Published by N. M. TRIPATHI (Private) Ltd., Bombay 2 : 1262 pages, Price Rs. 45.

The law of limitation in India has to a large extent been bogged by reason of its enumerative approach to the subject. Apart from the 30 sections stating general principles, no less than 148 causes of action have been detailed in the Schedule, each carrying its own period of limitation and on top of it all, there is also a residuary article, Article 120, which has been responsible for much confusion and a mass of case-law. Even in a country like England where there is a common law jurisprudence, alongside of statute law, the statute on limitation only specifies the types of action available and the period of limitation appropriate to each of them. Following upon the recommendation of the Fifth Interim Report of the Law Revision Committee, in 1934 the limitation law is stated in 34 sections without any schedules. In our country, most of the remedies available are derived from one enactment or another and, as such, it should be for each statute to prescribe the limitation applicable to the remedy provided by it. It should not be a function of the Limitation Act to do so. As it is, the Limitation Act is rather unscientific and illogical in its approach and has been responsible for a considerable number of judicial decisions, not always easy to reconcile. It should therefore be a matter for gratification that the Law Commission has in its Third Report stressed the need for simplifying and modernising the law of limitation.

Rustomji's work on limitation has become a classic and enjoys deserved popularity as a helpful treatise on the subject. It is not of that type of legal work which is little more than a glorified digest or a classified arrangement of cases with analyses or summaries of the important cases with some explanation of the rules to be deduced. On the other hand, it constitutes a juristic presentation of the matter with criticisms of decisions whenever needed. To edit such a work is not an easy task. The present Editor has, however, acquitted himself creditably. More than two decades have passed since the publication of the last edition and more than 4,000 cases had to be scrutinised and evaluated. It should not, therefore, be a matter for surprise if in the process, some decisions which may carry an appeal to others have escaped notice or have been dismissed as not requiring any special mention. The decision of the Madras High Court in *Ramagopal Naicker* v. *Muthukrishna Ayyar*[1], as to the effect of an acknowledgment, for purposes of section 19 of a debt by the Receiver in Insolvency does not seem to have been considered : likewise the decision of Subba Rao, C.J., and Ansari, J., in *Mylavarappu Subba Rao* v. *Mangalampalli Ramamurti*[2], holding that Article 44 has no application to a gift of a minor's property by his guardian, and dissenting from a contrary view taken in *Rangaswamy* v. *Marappa*[3], cited with approval in the book does not seem to to have been noted.

The present edition contains a number of helfpul features. A topical index is attached which is bound to be very serviceable. A number of suggestions for revision of the Limitation Act have been made and these should deserve attention. Extracts from the United Kingdom Limitation Act, 1939, have, given, facilitating comparison with the provisions of the Indian Limitation Act. Attention is invited been to the need for adoption of a common method of citation of cases particularly in view of the fact that citatoin by names of the parties has been done differently in different books and has become baffling, as for instance, where the same case is cited as *Abdul Karim Sahib* v. *Lakshmanaswami* by one author, and as *Tadinada* v. *Pulavarti* by another. To cut down bulk and increase in pages, resort has been had to close printing in small types. This is, however, a matter of doubtful utility. The book is sure to be of the greatest assistance to all practising lawyers as well as Judges.

S. VENKATARAMAN.

1. (1956) 2 M.L.J. 429.
2. (1957) 2 Andh. W.R. 282.
3. (1952) 2 M.L.J. 506.

THE HONOURABLE MR. JUSTICE GANAPATIA PILLAI.

We offer our felicitations to the Honourable Mr. Justice Ganapatia Pillai on his appointment as a Permanent Judge of the Madras High Court. Within the short time of less than a year, since his appointment as an Additional Judge of the High Court his Lordship has become very popular not only with the Bar but also with the larger public of the City of Madras and we are sure his appointment as a Permanent Judge of the High Court will be welcomed by all.

THE HONOURABLE MR. JUSTICE M. ANANTHANARAYANAN, I.C.S.

We offer our sincere felicitations to the Honourable Mr. Justice M. Ananthanarayanan on his elevation to the Bench of the Madras High Court. Mr. Justice Anathanarayanan belongs to the highly prized Indian Civil Service and is a senior civilian who has had a brilliant and distinguished academic record both in this country and overseas. He hails from a distinguished family of scholars and is himself known as a man of high academic and literary tastes. He is not new to the Members of the Bar as he has served as a District Judge for several years. In the past three years he has been the Director of Legal Studies at the Law College, Madras, and has been contributing erudite and useful articles on some of the current legal topics in several Periodicals.

His Lordship was sworn in on 10th August, 1959, by the Honourable Chief Justice in his Chambers. His Lordship sat in the Court the same day and was welcomed by Sri. R. Gopalaswami Iyengar, a senior member of the Bar, who assured him the co-operation of the Bar in the discharge of his Lordship's duties. With the background of high tradition and rich experience, both administrative and judicial, we are sure his Lordhsip will prove an useful asset to the Madras High Court.

We wish him a long and successful tenure of office in his new assignment.

BOOK REVIEWS.

ANCIENT FREEDOM—PUBLIC ADMINISTRATION OF THE IKSHVAKUS, by B. N. CHOBE, *Senior Advocate, Supreme Court of India,* Published by Purushottam Das Memorial Trust, Hyderabad : Price Rs. 2.50

Under the heading "Ancient Freedom—Public Administration of the Ikshvakus", Sri B. N. Chobe, Senior Advocate, Supreme Court of India, has contributed a number of essays dealing with varied topics ranging from the Rule of Law to the Women in the time of Ramayana. They are largely based on the author's study of the classics, in particular Ramayana, Dharmasastras and the Arthasastra of Kautilya. Whether one can entirely subscribe to his view that democracy in its modern concept was at work even during the Puranic times or not, a study of this book is bound to be interesting and helpful as it furnishes a volume of useful knowledge. The learned author has given proof of his extensive and intensive study of the Sanskrit lore, especially Valmiki's Ramayana. We have no doubt that the book will be very widely read and that it shall meet with the success it deserves.

CONVEYANCING COUNSEL, by H. R. Mehta, LL.M., Advocate. Published by Kailash Law Publishers, Basinau, Jullundur. Price Rs. 10.

This small handbook containing forms and precedents in conveyancing is bound to be of use to practitioners and laymen alike. If contains a fairly exhaustive collection of specimen forms relating to several transactions of frequent occurrence.

LAW RELATING TO INDUSTRIAL DISPUTES, by V. G. Row, Bar-at-law, Advocate, Madras. Madras Book Agency, Villivakkam, Madras. Price Rs. 12.50.

The book contains the text of the Industrial Disputes Act, 1947 and the Rules framed thereunder (Central Act and Rules) as amended up-to-date with notes and case-law. The book is divided into two parts, the first containing the Statute and Rules and the second relating to adjudication of disputes. The Author has brought to bear in his commentaries his practical experience gained in the conduct of cases in this field. The book is a useful addition to the existing books on the subject.

RESTRAINTS ON ALIENATION

By

G. VENKATA KRISHNAN, B.A., M.L., *Lecturer in Law and Advocate, Agra.*

Modern systems of Jurisprudence regard the right of alienation as the most important mark of absolute ownership. It is however a fact, that restraints on alienation had been imposed for various reasons in different systems of law. Such restraints were the result of certain kinds of property being regarded as sacred or highly precious and valuable or as things to be conserved and maintained without disintegration. The motivating factors have been many and varied.

In Anglo-Saxon times land was held absolutely without liability to pay rent or service. Such ownership was called allodial ownership. The position changed radically after the Norman Conquest. As a result of the Norman Conquest in 1066, the claim was set up that the King thereby became the owner of all the lands. It followed that there could be no private ownership in land. Such interest was referred to as an estate. The tenant derived his title immediately or mediately from the King. If he derived immediately, he was called tenant-in-chief. In most cases the person in actual possession would have derived his title through a chain of persons standing between him and the Sovereign. The person in possession was called tenant in demesne and the intermediate lords were called mesne lords. This process was termed as subinfeudation.

Feudal tenure restricted the power of alienation. A tenant could only grant fee to another to hold of himself as a mesne lord by means of subinfeudation. There was no question of the transfer of the entire interest of the transferor in the property. Subinfeudation was obnoxious to great lords by reason of its affecting their rights to marriage and wardship. Subinfeudation was abolished by Statute Quiae Emptores in 1290 during the time of Edward I.

Absolute ownership must be exclusive; it must be immediate and it must be beneficial. There are various degrees of ownership: (1) Absolute ownership; (2) Co-ownership; (3) Conditional ownership; (4) Future ownership; and (5) Trust ownership. At present time a tenant in fee-simple is in effect an absolute owner of the land for all practical purposes. Austin observed that the idea of absolute ownership is a right indefinite in point of user, unlimited in extent of duration, and alienable by the actual owner from every successor, who, in default of alienation by him, might make the subject of it. (Austin: Jurisprudence, page 835).

Certain species of property had been withdrawn in all systems of jurisprudence, from the operation of the general rules as to free alienation. Roman law distinguished between *res commercium* and *res extra commercium*. In English law, for a long timel anded property was inalienable. The same is true with Hindu Law. The Hindu joint family system had effectively precluded alienation of land. Apart from such special categories, alienation is incidental to and inseparable from the beneficial ownership of property.

The general principle that a restriction on alienation is void rests on the principle of repugnancy. Jarman says: " A power of alienation is necessarily and inseparably incidental to an estate in fee. If therefore, lands be devised to *A* and his heirs upon condition that he shall not alien, the condition is void."[1]

A restraint on alienation my be absolute or partial. An absolute restraint on the power of alienation is bad and it is repugnant to the nature of the estate. In *Metcalfe* v. *Metcalfe*[2], Kekewich, J., said " You cannot limit an estate to a man and his heirs until he shall convey the land to a stranger, because it is of the essence of

1. Jarman on Wills, 8th edition, volume II, page 1477.

2. (1890) L.R. 43 Ch.D. 633, 639.

an estate in fee that it confers free power of alienation, and it had long been settled that the same principle is applicable to gifts of personality." It is a question of substance and not of mere form whether the condition takes away the whole power of alienation substantially. The restraint may relate to (1) time, (2) class, (3) mode of alienation, etc. In In re *Rosher*[1], Rosher bequeathed to his son an estate absolutely, with a proviso that if the devisee or any person claiming through him desired to sell the estate in the lifetime of the testator's wife, she should have the option to purchase the estate at the price of £3,000. The value of the estate was £15,000. The question was whether the option of purchase given to the widow by will was null and void. It was held that the option given to the widow was absolute restraint on alienation though limited in time, *viz.*, the lifetime of the widow and that it was void. It amounts to saying " during the life of the widow, you shall not sell." This principle was followed in In re *Cockerill, Mackaness* v. *Percival*[2]. It is a settled principle that a restraint on alienation is bad even if it is limited in point of time. A condition contained in a grant to a man or married or unmarried woman that the donee shall not alienate at all; shall not alienate during a particular time; shall alienate only to a particular person; and shall not bar an entail, is void.

Partial restraint on alienation is valid. A condition is valid which restrains the owner from alienating to a specified person or to anyone except to a particular class of persons, provided the class is not too restricted. A gift over is void for repugnancy and the beneficiary takes absolutely.

Property cannot be given to a man exempt from the operation of bankruptcy. It was held in Re *Machu and Metcalfe* v. *Metcalfe*[3], that if property was given to a person absolutely, followed by a gift over to take effect on involuntary alienation, such as bankruptcy or insolvency, the gift over is void. A condition subsequent is void if it is uncertain either in expression or in operation. In *Jeffreys* v. *Jeffreys*[4], there was a condition that an "estate should be forfeited if the donee in any way associated, corresponded or visited with any of my present wife's nephews or nieces". It was held that the condition was void. The effect of a void condition has been set out as follows : —" If land is conveyed to a person on a condition, which is void, then in the case of a condition precedent, the conveyance is void and the interest does not arise ; but in the case of a condition subsequent, the condition alone is void, and the donee takes an absolute interest in the property free from the restrictive clause.[5]

The law in India is similar[6]. Among Muslims also a restriction on alienation is bad[7]. The principle that restraint on alienation is bad is of universal application.

Sections 10 to 18 of the Transfer of Property Act, 1882, give us the rules to be observed in transferring property. Section 10 of the Transfer of Property Act, 1882, as amended by Act XX of 1929 and Act V of 1930, deals with conditions restraining alienation. The section states : " Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest is void except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him : Provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein." In *Mudara* v. *Muthu Hengsu*[8], there was a partition deed which contained a clause that " if necessity arises for contracting debts on the liability of this property, all the major members of both branches should jointly do so. It was held that this clause was repugnant to the absolute interest created by the partition and was ineffective. In *Sarju Bala* v. *Jyotirmoyee*[9], a Hindu executed three documents whereby he granted immovable property to his daughter. There

1. (1884) L.R. 26 Ch.D. 801.
2. L.R. (1929) 2 Ch. 131.
3. 43 Ch. D. 633.
4. (1901) 84 L.J. 417.
5. Cheshire—Real Property, page 534.
6. *Venkataramana* v. *Bramanna*, (1869) 4 M.H.C. 345.
7. Tyabji—Mahommedan Law, 3rd edition, page 463.
8. A.I.R. 1935 Mad. 33.
9. I.L.R. 59 Cal. 142.

was a defeasance clause : " Further, if you or your heirs as aforesaid willingly give up your residence in Jayadevpur, and God forbid, if the particular heirs of you, whose rights have been mentioned, in respect of the lands of this patta, cease to exist, then the terms written in this patta will become inoperative, and the talik will revert to the right of me and my heirs." The Privy Council held that his daughter took an absolute estate of inheritance which she can dispose of by deed or by will and the condition should be disregarded as a restriction on the powers of an absolute owner which is repugnant to the estate.

As regards partial restraint on transfer there is no difference between English law and Indian law. In *Mahomed Raza* v. *Abbas Bandi*[1], a deed of compromise was entered between an intending husband and wife by which certain immovable property was given to the woman as permanent proprietor, and it was provided *inter alia* that she " shall not have power to transfer this property to a stranger ; but the ownership thereof as family property shall devolve on her legal heirs, from generation to generation." The wife sold and mortgaged all the property to strangers. And on her death the plaintiff claimed as her heir, sued to recover the property from the strangers (defendants) to whom it had been transferred by the deceased. Sir George Lowndes held that the condition was not absolute but partial ; it forbids alienation only to strangers, leaving her free to make any transfer she pleases within the ambit of the family. Their Lordships also held that even after the passing of the Transfer of Property Act, 1882, a partial restriction imposed by the document against alienation outside the family was not void for repugnancy. Sulaiman, C.J., pointed out in *Gayasi Ram* v. *Shahabuddin*[2], that "in order to see whether there is absolute restraint or not, one has to examine the effect of all the conditions and find out whether for all practical purposes alienation is prohibited. The mere fact that there may be some remote contingency in which there may be a possibility of an alienation taking place would not necessarily take the case out of the prohibition contained in section 10 of the Transfer of Property Act." In *Trichinopoly Varthaga Sangam, Ltd.* v. *Shanmuga Sundaram*[3], a partition deed was executed between a Hindu father and his five sons and a clause was inserted in the partition deed which ran as follows: " The three houses described in Schedule G shall be enjoyed in common by T. M. Chockalingam Pillai and his sons as at present during the life of Chocklingam Pillai. It shall not be competent for any of the said sons to sell, or mortgage or otherwise alienate the houses in Schedule G. during Chocklingam Pillai's lifetime. After Chocklingam Pillai's lifetime also the house in Schedule G should be enjoyed by the sons in common without partition and should not be let, sold or otherwise disposed of to any stranger. If any of the sons does not want to live in the house mentioned in Schedule G, he shall not be at liberty in any manner to let or lease, etc., his undivided share to a stranger or to the family but shall do so only to any of his brothers or their heirs for a sum not exceeding Rs. 1,000, the intention of all the parties to this deed being that the houses should be enjoyed by only the members of the family and their descendants and not by strangers." The question was whether this restriction on alienation amounts to an absolute restriction. Leach, C.J., pointed out that the Board in *Muhammad Raza* v. *Abbas Bandi*[4], considered the effect of prohibition so far as the deceased herself was concerned and the observations in that judgment went no further. Leach, C.J., further pointed out that restrictions against alienation outside the family applied to the parties to the deed and their descendants ; and held that the restriction imposed by the deed amounted to an absolute restriction on alienation within the meaning of section 10 of the Transfer of Property Act.

A donor who reserved a power of revocation to revoke his gifts in case of alienation is invalid. The Court held in *Shiba Prasad* v. *Lekraj & Co.*[5] that a restraint on involuntary alienation, *e.g.*, Court Sale is invalid and unenforceable.

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1. (1933) 63 M.L.J. 180.
2. (1935) I.L.R. 57 All. 861.
3. (1939) 2 M.L.J. 345 : I.L.R. (1939) Mad. 954, 960.
4. (1932) I.L.R. 7 Luck. 257 : L.R. 59 I.A. 236 (P.C.).
5. A.I.R. 1945 Pat. 162.

There are two exceptions to the rule against restraints on alienation in Indian law. A lease is an exception to the rule against restraint on alienations. A condition in a lease that the lessee shall not sub-lease or assign is valid. Section 108 (*j*) of the Transfer of Property Act, has to be read with the words "in the absence of a contract to the contrary." The restraint on the power of alienation in the case of a married woman who is not a Hindu, Mohamedan or Buddhist is another exception to the rule that restraints on alienation are void.

Where a condition with regard to the mode of enjoyment has been attached in a grant of an absolute estate, the condition is void. " Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction[1]. The corresponding section of the Indian Succession Act is section 138. Both in Hindu and Mahomedan law the invalidity of conditions of restraint of enjoyment of property is recognised. There is an exception to this rule which is recognised in *Tulk* v. *Moxhay*[2], that the transferor may impose conditions restraining the enjoyment of land if such restrictions are for the benefit of his adjoining land. Section 12 of the Transfer of Property Act says : " When property is transferred subject to a condition or limitation making any interest therein, reserved or given to for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void." Sections 13 to 17 of the Transfer of Property Act contain the rules concerning future estates. The most important of these rules is the rule against perpetuities. The rules restricting perpetuity, remoteness and against accumulations of income shall not apply in the case of transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind. (Section 18 of the Transfer of Property Act).

From the foregoing it is clear that in England for a long time land had been regarded as inalienable. By the Statute Quia Emptores, 1290, the power of alienation was recognised. Absolute ownership is single, independent, and unrestricted. It may be qualified in special instances and under special provisions. In English law absolute restraints on alienation are treated as void and partial restraints on alienation are permissible. The same is the position in Hindu and Muhammadan Law. Judicial decisions in India have also followed the same principle—that absolute restraints on alienation are bad and partial restraints on alienation are good. According to sections 10 and 11 of the Transfer of Property Act, 1882, absolute restraints on alienation are void and partial restraints are good and a restriction on the enjoyment of property is void.

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1. Section 11 of the Transfer of Property Act.

2. (1848) 2 Phill. 774.

UNVEILING OF THE PORTRAIT OF T. L. Venkatarama Aiyar in the Supreme Court.

The following speech was delivered by Shri M. C. Setalvad, Attorney-General of India on the occasion of the unveiling of the portrait of Shri T. L. Venkatarama Aiyar, Retired Judge of the Supoereme Court, on 14th August, 1959, in the Supreme Court:

SPEECH DELIVERED BY SHRI M. C. SETALVAD:

I deem it a great privilege to have the opportunity to present to this Court on behalf of the Bar in India the portrait of Justice Aiyar who has recently retired from this Court.

In our system of administration of justice, the Bench and the Bar are two inseparable complements making for its efficiency. Though the judiciary is, as it were, the predominant partner in the carrying on of this great undertaking the Bar may well claim to be the parent of the predominant judicial element. For it is the Bar which is the main and in some countries the sole recruiting ground for the judiciary. Indeed in some countries organisations of the Bar have a voice in the selection of some of those who preside over important Courts. Members of the Bar practising in a Court are, therefore, perhaps best fitted to truly appraise the worth of a judicial career. It has been said that "the Bar is the Judge of all Judges." It is, therefore, appropriate that the Bar should now and again express its respectful appreciation of those who have filled judicial office with distinction. Such appreciation expressed from time to time is, I venture to say, bound to promote a healthy co-operation between the two main elements which enable our judicial system to function. These and like sentiments have prompted the Bar in India to offer its humble tribute to the distinguished judicial career of Justice Aiyar.

It is well to remember that while the Bar respects and honours all the Judges it wisely singles out the more distinguished ones so that the memory of their inspiring careers may be preserved on the walls of this Court House. The value of the tribute lies essentially in the discrimination which the Bar exercises in choosing the luminous stars in the judicial firmament for its appreciation.

The Bar has, I think, a peculiar sense of gratification and pride in paying this tribute of appreciation. Justice Aiyar could perhaps be said to have been a direct recruit from the Bar more than any other Judge of this Court. If my memory serves me right, he was persuaded to accept a seat on the Bench of the Madras High Court only at a late stage of his long and distinguished career at the Bar. Sitting frequently as the colleague of the

learned Chief Justice of that Court he soon came to be regarded as an erudite Judge delivering important judgments on numerous constitutional and other matters. After a very short judicial experience on the Bench of that Court he was brought to the Supreme Court; and we all know how he adorned the Supreme Court Bench. His career as a Supreme Court Judge would seem to belie the theory that judicial experience alone ensures a "capacity to form a sound and a balanced judgment and to express it with clarity." The judicial eminence of Justice Aiyar derives from his great training at the Bar at Madras.

It would be presumptuous for me to attempt to speak of the numerous sectors of law which he has covered and the fresh ground which he has broken on many a legal topic in the numerous lucid and penetrating judgments which he has delivered in this Court. Most of those present here are as or perhaps more familiar than I am with his great achievements in the judicial field.

Perhaps I cannot do better than quote the words in which a member of the Bar expressed his appreciation of the Judge on the day of his retirement.

"Whether it was a question of the interpretation of the Constitution, a point of law touching industrial relations, a problem of Hindu Law, or a complicated issue of fact, arguments at the Bar even by its juniormost members were patiently received and quickly and fully appreciated. Not unoften the argument was indeed made clearer and more forceful by the manner in which the Court made a clarification of it to counsel. The Judge's opinions on a number of complicated legal questions which lie embedded in the Reports bear the stamp . . . . of a rare combination of a subtle and penetrating intellect with a far-reaching breadth of view. These great attributes were carried withal by a personality ever so gentle, unassuming and humble in mind."

Humility of mind is, it is said, indispensable to the making of a great Judge. The consciousness that legal and juristic principles constitute a vast field which one can never hope to fully explore and that life and circumstances exhibit countless and inexhaustible facets must needs results in making a Judge's mind extremely receptive and apt to the enunciation of fresh and far-reaching principles. If I may be permitted to say so, Justice Aiyar possessed this indispensable quality in a considerable degree.

Nor were his interests confined exclusively to law. Notwithstanding his pre-occupations as a practising lawyer and a Judge he could find time to delve deeply into Sanskrit literature and philosophy and is, I understand, a connoisseur of scientific Indian music.

Let me express on behalf of the Bar its sincere wishes that the distinguished Judge may yet be with us for many happy years to serve the public in other useful spheres.

I now request the Chief Justice and the Judges of the Supreme Court to be gracious enough to accept the portrait of Justice Aiyar, painted by the well-known Artist Sri Deuskar, for being hung in this Court room where he was accustomed to sit as a tribute by the Bar to his distinguished judicial career.

SPEECH DELIVERED ON THE OCCASION BY THE HON'BLE THE CHIEF JUSTICE OF INDIA.

My colleagues and I have great pleasure in accepting the life-size portrait of our erstwhile colleague, Shri T. L. Venkatarama Aiyar, which, you, Mr. Attorney-General, have on behalf of the Bar of India, just presented to this Court. By this graceful act, you have paid a handsome tribute to an eminent jurist, a conscientious Judge and a great gentleman to whom honour and respect are justly due. On behalf of the Court, I offer to the Bar of India our grateful thanks for what may be called a token of their affection for the great Judge..

I am happy to recall the pleasant memories of our very close association with Shri T. L. Venkatarama Aiyar for about five years during which we had the benefit of his sound advice and guidance. He extended to us in and out of Court great consideration, courtesy and kindness. To the members of the Bar, who appeared before him, he habitually gave a patient hearing and a sympathetic consideration. While he was readily appreciative of the merit of an argument carefully prepared and earnestly propounded, he was at the same time prompt in rejecting a seemingly plausible but substantially false argument. He was always courteous and receptive and yet he was firm and outspoken when an occasion arose. His temper had never been seen to be ruffled or frayed and the serene expression of his benevolent countenance and his genial temperament made work in his Court pleasant and fruitful. The Law Reports will bear testimony to his deep legal learning and erudition and his grasp of and mastery over the fundamental legal principles. Indeed, by his conscientious discharge of his onerous duties and the excellence of his contribution to the development of our law—whether in the domain of Hindu Law, Constitutional Law or in tax matters—he has deservedly earned your affection and respect.

As a man he has been unostentatious and of simple habits. In his daily life he reflects the ancient Indian ideal of plain living and high thinking. His interest in life has not been confined to the domain of law only but has a wider sweep embracing the realm of Sanskrit literature, music and the ancient scriptures. The presentation of his portrait manifestly marks the deep appreciation, on the part of the members of the Bar, of the sterling qualities of his head and heart. This portrait will always be a source of inspiration to the future generation of Judges who will come and work in

this Court that honest hard work alone can earn for a Judge the high and unstinted admiration of the members of the legal profession.

We are, indeed, fortunate in having him in our midst, although he is serving the nation in a different but an allied field. I have no doubt that this demonstration by the members of the Bar of their deep appreciation of his vast learning and other virtues will touch his heart. I take this opportunity of congratulating him on the great and unique distinction which the presentation of his portrait in his lifetime clearly signifies. This portrait hanging on the walls of this Court will always be a visible symbol of the deep appreciation of the members of the profession of the greatness and goodness of an eminent jurist, a conscientious Judge and a lovable gentleman.

With these few words, I proceed to unveil this portrait that you have presented to the Court.

THE OUTGOING AND INCOMING CHIEF JUSTICES OF THE SUPREME COURT.

Within the almost ten years that have elapsed since the Supreme Court was established there have been no less than five different Chief Justices. The latest of them is Shri Sudhi Ranjan Das. The tenure of each of the incumbents has been too short to enable him to leave any powerful impression of his individuality or legal philosophy in regard to the work of the Court. Each of the Chief Justices so far, has, however, been a person with large judicial experience as a Judge of the, High Court and the Federal Court and that has enabled him to bring into the Supreme Court mature and mellow wisdom and an intimate acquaintance with the different branches of the law. The office of Chief Justice is one which calls for the highest qualities in the person appointed to the post, legal erudition, integrity, impartiality, learning, and great courage. The Chief Justice has, apart from his judicial functions, other duties as well. It is his advice that will guide the Government in appointing Judges to the Supreme Court and to the different High Courts. It will be useful to recall in this context that the Law Commission has suggested that the person to be appointed as Chief Justice should be appointed at such an age as will give him at least a ten-year tenure of office, and that the Chief Justice may also be directly appointed from the Bar.

Shri Sudhi Ranjan Das was called to the Bar from the Gray's Inn in 1918, joined the Calcutta Bar in 1919, and, in course of time, acquired a considerable practice. He was also, for some time, a Lecturer at the Calcutta Law College. He became an Additional Judge of the Calcutta High Court in 1942 and a permanent Judge in 1944. He was appointed as the Chief Justice of the East Punjab High Court in January, 1949 and within less than a year became a Judge of the Federal Court in the first instance and thereafter when the Supreme Court was constituted, a Judge of the Supreme Court. Since December, 1955, he has been the Chief Justice of that Court.

These are times when the country is rapidly moving from the era of individualism to one of greater social sensitivity. Constitutional law presents the extremes of judicial opportunity. The Supreme Court, as the final interpreter of the Constitution, has a special place and is always looked to for proper and correct guidance and fearless exposition. It has been said that where the language is explicit, the precept complete, the particular situation provided for, the mandate of the Constitution represents the ultimate imperatives. These conditions seldom occur in the cases that reach the Court, and it is in the field of constitutional decision that the breadth and sweep of the written words afford the freest play for the constructive work of the Judge in the light of the spirit of the Constitution. The Judge has to bring to his office all that he is, all that he has, and all that he can win from the garnered knowledge of the world. Shri Sudhi Ranjan Das had an adequate appreciation of these factors. He knew that law is man's servant and not his master and that interpretation of law should make it more truly reflective of a changing

society. In *State of Bombay* v. *Chamarbaugwala*[1], with reference to betting and gambling he observed that to control and restrict betting and gambling is not to interfere with trade, commerce or intercourse, as such, but to keep the flow of trade, commerce, and intercourse free and unpolluted and save it from anti-social activities. In *Garikapati Veerayya* v. *Subbiah Choudhury*[2], he ruled that where a suit had been instituted before the date of the Constitution, the parties thereto had from the date of the institution of the suit, a vested right of appeal, upon terms and conditions then in force. The learned Chief Justice was unsparing and outspoken in his criticism of arbitrary executive action. In *Ghaio Mal and Sons* v. *State of Delhi*[3], on an application for *certiorari*, he observed : " We strongly deprecate this attempt on the part of the official respondents to bypass the Court. We are bound to observe that the facts appearing on the records before us disclose a state of affairs which does not reflect any credit on the administration of the erstwhile State of Delhi ". In *Dalmia* v. *Justice Tendolkar*[4], apropos the powers given under the Commissions of Enquiry Act, 1952, he said: " We feel sure that if this law is administered by the Government with an evil eye and an unequal hand or for an oblique or unworthy purpose the arms of the Court will be long enough to reach it and strike down such abuse with a heavy hand ".

In the retirement of Shri Sudhi Ranjan Das the Supreme Court will be losing the services of an erudite, able and much respected Chief Justice.

Shri Bhuvaneshwar Prasad Sinha, the new Chief Justice, has been an eminent Judge of the Supreme Court since December, 1954. Born on February 1, 1899, he joined the Patna Bar in 1922 and successively held the posts of Government Pleader in 1935, Assistant Government Advocate in 1940, Judge of the Patna High Court in 1943 and Chief Justice of the Nagpur High Court during 1951 to 1954. Justice Sinha has the gifit of clear analysis and luminous exposition. His appointment as Chief Justice will, we are sure, give satisfaction to all. We extend our respectful felicitations to him on his new assignment.

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1. (1957) S.C.J. 607 : (1957) 2 M.L.J. (S.C.) 87 : (1957) 2 An.W.R. (S.C.) 87 : 1957 M.L.J. (Cr.) 558.
2. (1957) S.C.J. 439 : (1957) 2 M. L. J. (S.C.) 1 : (1957) 2 An.W.R. (S.C.) 1.
3. (1959) S.C.J. 105.
4. (1959) S. C. J. 147 : (1959) 1 M. L. J. (S.C.) 67 : (1959) 1 An.W.R. (S.C.) 67.